THE GREY AREA

LEGAL BULLETIN

Concordia UNIVERSITY

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Editor's Note

In the 15 months since I became Legal Counsel to the University one of my goals has been to publish a Legal Bulletin to complement my primary task of providing legal advice and information to the University community.

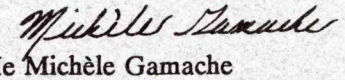
It is *your* Legal Bulletin so, if you have any questions which you think would be of interest to the community as a whole or if you need further information about any point we raise, please drop us a line at S-BC 124 (local 4854).

The Bulletin will concentrate on five fields: Employment Law; Health and Safety Law; Administrative and Disciplinary Law; Rights and Freedoms; Contracts. It will be published every two months during the academic year.

We hope that the Legal Bulletin will play a significant part in the information role assumed by the Secretary General, Me Bérengère Gaudet, and her assistant, Marie-Andrée Robitaille. In particular, Me Gaudet and Mme Robitaille are responsible for helping members of the Concordia community with respect to the daily application of the Copyright Act.

The Office of the Secretary General has also assumed responsibility (as of June 1st, 1990) for all University Policies and Official Documents (Manuals A and C). If you have any questions relating to these Policies and Documents, please contact Mme Robitaille at local 4811.

Finally, I would like to thank my Reseach Assistant, Bram Freedman, who worked all summer to establish a data bank and who helped write the Bulletin itself and my Assistant Editor, Alison Kavanagh, without whose creativity and hard work this Bulletin would not have been possible. I would also like to thank Me Gaudet for her notable legal perspective in the naming of our bulletin.



Me Michèle Gamache
Legal Counsel

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In order to understand Employment Law, it is important to know which laws regulate this field. We will identify and briefly describe these laws.

Labour Standards Act

This Act sets out minimum employment standards with respect to obligations in the employment relationship. These standards concern minimum wages, maximum hours of work, the granting and payment of overtime pay, vacation and holiday pay, the granting of pregnancy leave and notice of termination of employment. A Commission exists to hear complaints from employees who feel that their employer has breached a provision of the Act.

The Act applies to most of the employees in the province who are not covered by a collective agreement. However, it should be noted that neither a collective agreement nor an individual employment contract may contain provisions which contravene the minimum standards set out in the Act.

Labour Code

This Act regulates the employment relationship existing between a union and an employer. It establishes an accreditation process which has to be followed by any employees' association which would like to become a union. This Act also sets out the obligations of a union. It regulates the negotiation of a collective agreement, particularly the first one to be applied in an enterprise or an institution; it establishes the grievance process which flows from a collective agreement, the jurisdiction of a grievance arbitration and it regulates strikes and lock-outs. The Act also provides for the existence of a *Conseil des services essentiels*, which may impose the providing of certain public services by public and para-public bodies during periods of strike.

Civil Code

The Québec *Civil Code* applies to any employment contract, subject to the application of the *Labour Standards Act*. It sets out the general legal framework of an employment contract not covered by the *Labour Code*. The *Civil Code* is useful when it comes to the interpretation of contracts, for instance when a contract is unclear or doubtful.

Québec Charter of Rights and Freedoms

The Québec Charter covers all matters which are under the legislative jurisdiction of Québec. It is generally accepted among legal scholars in Québec that the Charter is applicable to private relationships whenever its interpretation justifies such a conclusion. Thus, any employment contract could not stipulate a provision entailing a type of discrimination which is prohibited under the Charter; the provision would be deemed inoperative.

Some aspects of the labour agreement between the University, faculty and support staff fall within the purview of the Charter. Employment equity, for instance, is covered because the Charter states that "Every employer shall, without discrimination, grant equal salary or wages to the members of its personnel who perform equivalent work at the same place." It also provides that, with respect to employment, no individual shall be the victim of discrimination which is prohibited under the Charter. An employment equity policy or program is deemed to be non-discriminatory if it is established in accordance with the terms of the Charter.

Canadian Charter of Rights and Freedoms

According to the Supreme Court of Canada, the Canadian Charter applies to the actions of the legislative, executive and administrative branches of Provincial and Federal governments. It cannot apply to a purely private litigation without any connection to government.

However, the Québec Charter or any other provincial Act is subject to the Canadian Charter because it is a piece of legislation and, as such, could be challenged in Court if it permits a discrimination that the Canadian Charter expressly or implicitly prohibits.

Thus, any provincial Act which applies to an employment contract must not infringe on a right guaranteed by the Canadian Charter. If this is the case and a tribunal could not reach the conclusion that the law or some of its provisions would not constitute reasonable limits as can be demonstrably justified in a free and democratic society, they would be unconstitutional and, therefore, null and void.

Occupational Health and Safety Act

This is the cornerstone of all health legislation in the province. Its goal is the elimination at the source of all danger to the health, safety and physical well-being of workers. To this end, it elaborates employer-employee rights and obligations and puts in place mechanisms such as joint health-and-safety committees and the appointing of a safety representative to ensure employees' participation in decisions affecting their health and safety. Although it was passed in December 1979, the law has been applied gradually by companies and institutions. By the end of 1991, all employers with 20 or more employees in all sectors will be obliged to comply with all the articles of the law. Also by that time, educational institutions will have to conform fully to the Act.

Industrial Accidents and Occupational Diseases Act

This Act applies to almost all workers in the province of Québec and is concerned with material compensation for work-related accidents and diseases. All staff and faculty, both full and part-time, including students undergoing an internship and graduate students receiving a stipend or bursary in return for services, are covered by it. Volunteer workers are also covered.

This Act also deals with all aspects of workers' compensation: salary replacement, medical and rehabilitative services, job security, survivor benefits and protective assignment. The workers' compensation system is a mandatory insurance scheme financed by the employer and administered by the *Commission de la santé et de la sécurité au travail* (CSST).

Labour Relations: A Federal or a Provincial Matter?

Article 92 of the *Constitutional Act of 1867* states that property and civil rights are within provincial jurisdiction. This jurisdiction includes labour relations, employment contracts and collective agreements. This explains the existence of the Québec *Labour Standards Act* and the *Labour Code.*

However, the Parliament of Canada may regulate labour relations related to federal industries or businesses such as banks, shipping, radio, television and cable enterprises. For that reason, the *Canadian Labour Code* applies to them instead of the Québec *Labour Code*. These enterprises are also subject to the *Canadian Human Rights Act*, the equivalent of our Québec *Charter of Rights and Freedoms.*

QUESTIONS & ANSWERS

Q: What are the rights of a non-unionized employee under the Labour Standards Act?

A: This Act states that employees other than managerial staff who have more than five years of continuous service may only be dismissed for just and sufficient cause. An employee may lodge a complaint, within 30 days of dismissal, alleging that there was not just and sufficient cause and asking for damages and/or reinstatement. This complaint would be heard by an arbitrator of the *Commission des normes du travail.*

Q: Does it mean that a non-unionized employee who has less than five years of service with the same employer may be dismissed without cause?

A: No. An employer cannot put an end to a limited-term or an unlimited-term contract without just and sufficient cause.

A contract may contain a clause stating that the employer reserves its rights to terminate it without cause. However, the Courts will respect a pre-notice clause only if it has not been used in an abusive way and that just and sufficient cause for dismissal existed.

Otherwise, a person holding a limited-term contract would be entitled to obtain, as damages, a severance package equivalent to his or her salary up to the end of the contract. If a person holds an unlimited-term contract, he or she could obtain a sum which would be considered reasonable as a compensation.

Q: What about unionized employees?

A: Unionized employees are covered by a collective agreement that usually does away with the five-year rule mentioned above. It will stipulate that all employees may only be dismissed for just and sufficient cause.

Q: What constitutes just and sufficient cause?

A: Unfortunately, there is no finite list of what constitutes just and sufficient cause. It is clear, however, that arbitrators will require that the employee has breached an important obligation in the employment relationship. This may include theft, dishonesty, insubordination or the poisoning of the work atmosphere to the extent that the smooth operation of the enterprise is jeopardized.

Q: Can an employee be dismissed after a single incident?

A: Usually, the answer is "no" unless the single incident is very serious. It must be noted that the law governing labour relations is aimed at protecting the employee. As such, the goal of any disciplinary action is to readapt and reintegrate the employee into the enterprise. Dismissal is a last resort when all other avenues have been exhausted.

Q: How does an employer prove that all other avenues have been exhausted?

A: It must be able to show that the employee was given sufficient warning that unless his or her actions were remedied he or she would be dismissed. As well, arbitrators will require a progression of sanctions leading up to dismissal. A written record of complaints and any warnings or discussions with the employee about these complaints must be kept in the employee's file.

Q: What actions will an arbitrator take into account when cancelling or reducing the disciplinary action of an employer?

A: He or she will find fault with the employer's provocation, discrimination in the sanction and, most importantly, lack of sufficient warning and/or a progression of sanctions. As well, non-voluntary events or situations such as illness or accident are not susceptible to disciplinary action. In other words, the employee must have exhibited an *intention* to breach an obligation of the employment relationship.

CASE LAW

Work-related Sexual Harassment

More and more institutions have adopted Sexual Harassment Policies, and rightly so.

In the case of *Robichaud v. Conseil du trésor du Canada*, the Supreme Court of Canada ruled that an employer was liable for sexual harassment perpetrated by its employees pursuant to the *Canadian Human Rights Act*.

The Court stated that an employer who responds to a complaint of sexual harassment quickly and effectively in order to remedy and prevent its recurrence will not be liable (if it is found to be liable at all) to the same extent as an employer who fails to adopt such steps.

This decision had been reaffirmed recently in *Jantzen v. Platy Enterprises* where the Supreme Court of Canada ruled that an employer was liable for the sexual harassment perpetrated by one of its employees where the employee's actions were work-related. The evidence revealed that this employer did not ensure that the harassment stopped even after specific complaints were made.

All the Canadian case law above concerns sexual harassment perpetrated by employees towards other employees. Nevertheless, Article 10.1 of the Québec *Charter of Rights and Freedoms*, which prohibits sexual harassment, benefits students as well.

(Cases discussed: *Robichaud v. Conseil du trésor du Canada,* [1987] 2 S.C.R., 84; *Jantzen v. Platy Enterprises Ltd,* [1987] 1 S.C.R., 1252.)

Duty to Disclose

Some authors have discussed the question of the duty of an employee to disclose theft or fraud committed by a fellow employee to the employer. Some labour arbitrators agree with the existence of such a duty.

However, it seems that a unionized employee does not owe his or her employer the same "positive" duties as does an administrator or managerial staff. Thus, the latter's obligation is more intense, taking into account his or her responsibilities and sphere of control. According to A. Rousseau, labour arbitrator:

> "L'employeur sera en droit de s'attendre à ce que les cadres supérieurs qui sont ses collaborateurs s'emploient d'une manière particulière à promouvoir les intérêts de l'entreprise."

Obligation of Good Faith and Loyalty

Good faith which underscores loyalty, are both implied obligations in every employment contract. However, according to the Supreme Court of Canada, the intensity of this obligation will depend on the employee's functions and responsibilities.

In the case *Bank of Montréal v. Kuet Leon Ng*, the Court declared that any employee's obligation of honesty and good faith encompasses, at the minimum, conscientious execution of his or her contractual obligations. But the intensity of the obligation increases for administrators or senior managers, depending on their sphere of control.

In this case, the Court condemned Kuet Leon Ng to pay the Bank of Montréal the amount of $660,135.82. He was a foreign currency trader who completed transactions for his own profit by using the bank's funds. He also made transactions for two or three of the bank's clients on the secret condition that he would receive one half of any trading profits.

(Case discussed: *Bank of Montréal v. Kuet Leon Ng*, [1989] S.C.R., 429.)

GENERAL PRINCIPLES WITH RESPECT TO...

Dismissal and Other Disciplinary Measures

It must be stressed that the main objective of any disciplinary action is the rehabilitation and reintegration of the employee into the enterprise. The punitive aspect is always secondary. In this sense, dismissal is the ultimate disciplinary action and cannot be taken lightly. However, this sanction may and sometimes must be imposed when an employee has breached the trust vested in him or her by the employer.

There are several general notions that appear time and again in arbitration and court decisions:

Sufficient warning and progression of sanctions: Arbitrators will require a progression of sanctions before upholding dismissal. As well, the employee must have been aware that his or her behaviour, if not remedied, could lead to the sanction of dismissal.

The employee must be told officially that his or her behaviour is unsatisfactory and this must be documented in order to prove that a pattern of behaviour existed.

The proof of such a pattern is known as the "doctrine of the culminating incident," which arbitrators have deemed to be a valid cause for dismissal.

Again we stress that ***a written record of complaints and any warnings or discussions with the employee about these complaints must be kept in the employee's file.***

Errors made by the employer may lead to the cancellation or reduction of the disciplinary measure: Management may be held partially to blame when it overlooks rule violations or permits a course of misconduct to continue without taking prompt action to halt such misconduct.

Rules of the institution: Internal rules and policies cannot be arbitrary, abusive or discriminatory. They must be clear because if there is a doubt it will be deemed to be in favour of the employee.

Discrimination in the sanction: An employer must maintain a certain coherence in the imposition of sanctions. Of course, different sanctions may be imposed for similar events that have distinct characteristics but the general rule is uniformity of sanctions.

Provocation by the employer acting through its administrators: No specific definition of provocation has been articulated in the field of Employment Law but it seems that it must be immediate and proportional to the act that it leads to for it to be considered a valid defence.

These principles are followed by arbitrators whether they act under the *Labour Standards Act* or a collective agreement.

Concordia University has a written Disciplinary Measure Policy which appears in Book C of the Official University Policies.

(This article was largely inspired by Claude d'Aoust, Louis Leclerc and Gilles Trudeau, *Les mesures disciplinaires: étude jurisprudentielle et doctrinale*, Montréal, École des relations industrielles, 1982.)

Just and Sufficient Cause for Dismissal

In the case *Chisholm v. Bossé, Charbonneau Inc.*, Justice Toth defined as a reasonable motive for dismissal a violation by an employee of an essential condition of his or her employment contract or reprehensible conduct within the scope or in the course of his or her duties. While no comprehensive, these are the most common grounds for dismissal.

Absenteeism: May justify dismissal if an employee has received several warnings.

Conflict of interest or dishonesty: When the conduct of any employee causes a serious prejudice to the employer or breaches the trust vested in him or her by the employer.

Incompetence: If a person does not possess the qualities necessary for the accomplishment of his or her functions, it may justify his or her dismissal.

Insubordination: This motive is invoked the most frequently by employers to justify disciplinary action. However, an employee need only obey legitimate, legal orders and they must be clear, unequivocal and well-understood by the employee. Threats, abusive language and aggression toward a superior may also lead to dismissal. However, it must be determined whether the fault was caused by an illness, excessive stress or provocation. If this is the case, the gravity of the fault will be mitigated. We must look for a pattern and not a momentary "flare-up."

(Case discussed: *Chisholm v. Bossé, Charbonneau Inc.*, S.C. Mtl, J.E. 84-561.)

Did you know that...

The Québec Charter of Rights and Freedoms states that a person cannot be dismissed because he or she has pleaded guilty to a criminal offence or has been found guilty of a criminal offence. However, if a link exists between the offence and the employee's duties, it can be a just and sufficient cause for dismissal. Thus, recently, an arbitrator declared valid the dismissal of a maintenance person in a hospital for children who had pleaded guilty to sexual aggression towards a child. The arbitrator considered the impact on the confidence of the public toward the institution if he had decided to maintain the employee in his position.

(Case discussed: *Syndicat national des employés de l'Hôpital Ste-Justine et Hôpital Ste-Justine,* 90T-324.)

Alcoholism is recognized by arbitrators as a chronic illness. For that reason, it is considered as an involuntary fault on the part of an employee. While an employer must be tolerant, there are limits. An employer does not have to wait indefinitely for an employee's rehabilitation. An employee, supported by his or her employer through a rehabilitation programme and who has received several warnings, may be dismissed. An arbitrator has stated that the success of a rehabilitation programme depends on the will of the concerned person. When this will does not exist, dismissal is a proper sanction.

(Case discussed: *Syndicat national des travailleurs des pâtes et papiers de Pont Rouge Inc., (C.S.D.) v. Matériaux de construction Canada Ltée (B.P.C.O.), Division de Pont Rouge,* D.T.E. 90T-485, decision dated January 29, 1990.)

The right to strike is not a right protected by the Canadian Charter of Rights and Freedoms. The Charter protects the freedom of association. However, according to the Supreme Court of Canada, neither collective negotiations nor strikes are activities protected as such by the freedom of association guaranteed by the Charter. Thus, in 1987, the Court ruled that a provincial Act prohibiting strikes and lock-outs and prescribing a mandatory arbitration process was not unconstitutional. Recently, the Court elaborated on its previous decision in declaring that the Charter protects the freedom to continue, maintain or adhere to an association, but does not protect an activity for the sole reason that it constitutes a fundamental or essential object for an association.

(Cases discussed: Re *Public Service Employee Relations Act,* [1987] 1 S.C.R. 313; *Institut Professionnel de la fonction publique du Canada v. Territoires du Nord-Ouest*, (Commissaire), decision unreported as yet, dated August 17, 1990.)

The University may be held liable for damage caused by a volunteer. As long as the University may direct a person in the work given him or her to perform, a "master-servant" relationship exists. The latter exists even if the "master", in fact, does not exercise his or her power of control. It is sufficient that the master held the power at the time the damage was caused. The essential conditions of the existence of civil liability are the capacity to discern right from wrong, a fault, damage and a causal link between a fault and damage. In order to appreciate what a fault consists of, it is proper to mention that the law does not require a prudent and vigilant person to foresee everything that might happen, but only what is sufficiently probable to happen.

It should be noted that a volunteer who works for the University is protected from civil liability through the liability insurance of the University. However, such insurance does not cover a fault that has been committed outside the normal scope of the performance of an employee's or volunteer's duties or in the event that he or she has acted with gross neglect or maliciously.

NEXT ISSUE: Health and Safety Law

If you have any particular questions regarding Health and Safety, please send them to us at the Legal Counsel Office, BC 124.

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This Bulletin has been prepared for purposes of general information only. It must in no case be considered as a comprehensive study of the law nor an expression of opinion upon the matters reviewed in it. It would be advisable to consult with the Legal Counsel on any question concerning one's individual circumstances.